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September 25, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 12, 2007

Case Number: TSO-0505

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxxxxxx (hereinafter "the individual") for an access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

The individual has been employed at the DOE site since 2005. On March 29, 2007, the DOE issued a notification letter to the individual. Attached to the notification letter was a statement entitled "Information creating a substantial doubt regarding eligibility for an Access Authorization" (hereinafter referred to as the "information statement").

The security concerns specified in the information statement relate to the events of the evening of June 30, 2006. Those events led to the death of the individual's neighbor by asphyxiation at 12:20 A.M. on July 1, 2006. (hereinafter "the July 1 death" or "the July 1 incident"). The conclusion of the police report indicates "[The individual] and [his neighbor] engaged in consensual sex in [the individual's] residence. It appears that [the neighbor] requested that [the individual] choke her during sex. [The individual] choked [the neighbor] resulting in her death. DOE exhibit #12 (hereinafter police report) at 11. The autopsy found the death occurred by asphyxia due to neck compression during sexual intercourse and ruled the death to be a homicide. Police report at 11. On August 10, 2006, the individual was arrested for Willful/Wanton Disregard Resulting in Death. Transcript of Access Authorization Hearing (hereinafter "Tr." at 268). On December 28, 2006, the individual signed a Guilty Plea Agreement. DOE exhibit #10. On March 5, 2007, the individual was sentenced to 12 months of incarceration, suspended, 3 years of probation, restitution, mental health counseling, and required not to use alcohol. DOE exhibit #10. The notification letter indicates that the individual's involvement in the death of another person raises a security concern under Criterion L. 10 C.F.R. §710.8(l).

A second security concern specified in the information statement involves the individual's statement during July 1, 2006 police interviews and his statements during his August 23, 2006 personnel security interview

(PSI). On the basis of the police report and the transcript of the PSI the information statement finds the individual failed to provide complete and accurate information about the circumstances surrounding the July 1 death. Specifically, the notification letter refers to the individual's statements during the PSI that "he had not asphyxiated or suffocated his neighbor . . . during sexual relations" and his statement that "he had not cut off oxygen to her in any way during sex." Information statement at 1. The information statement finds that the individual's inaccurate statements raise a security concern under Criterion F. 10 C.F.R. §710.8(f).

The notification letter informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual requested a hearing. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the hearing).

II. HEARING TESTIMONY

A. The Individual's Wife

The individual's wife testified that she met the individual in 1990 and they were married in 1995. Their son was born in 1997. Tr. at 11. Their marriage, except for the July 1 incident, has always been monogamous. Tr. at 31. During 2003, they were separated for 7 months. Tr. at 12. Since that separation, there were no marital problems prior to the July 1 incident. Tr. at 17. She and the individual have never engaged in sexual asphyxiation or in any other form of rough sexual activities. Tr. at 39. The individual has never dated anyone other than herself. Tr. at 39.

She testified that she has never known the individual to engage in dangerous recreational activities. Tr. at 21. She testified that the individual "is the type of person that's afraid to do things. He's very straight, very to the rules kind of guy. Sometimes I think he's too strict. Sometimes I tell him he needs to lay back a little bit, because he's too worried about what other people may think." Tr. at 22. She also believes the individual does not have "guts enough to do [things outside of the norm]." Tr. at 33.

The individual's wife testified that she did not really know the neighbor. Tr. at 19. Their children played together but she never socialized with the neighbor and did not know her last name. Tr. at 19.

She testified about the night of the incident. The individual's wife works the night shift, 8 pm to 6:30 AM. Tr. at 29. At a neighborhood potluck on June 30 she mentioned to her neighbor that her son was out of town for a few days and she was working the night shift at her job. Tr. at 18. Shortly after midnight on July 1, she received a telephone call from her husband. He informed her that their neighbor had died in their home and requested that she return home. Tr. at 18. When she arrived, there were a number of police cars in front of their home. Tr. 37. She entered the home but the police would not permit her to speak with her husband. Tr. at 37. During this period she observed that the police were questioning her husband, and the police told her that the individual and the neighbor had a sexual encounter and she had passed away. The police did not tell her that the cause of death was asphyxiation. Tr. at 38. Sometime after 3:00 A.M. when they let her talk to the individual, "he was upset, he was crying." Tr. at 25.

When she learned that the cause of death was asphyxiation, she questioned her husband about the facts surrounding the death. She testified that the individual told her that he does not remember choking the neighbor. "He says she grabbed his hand and she put it on her neck, but he says he didn't choke her." Tr. at 40. He told her "he doesn't understand why she died. He doesn't think that he did it." Tr. at 41. "He doesn't understand why – how she died. He doesn't understand what happened." Tr. at 24. She believes "It's just a bad-luck situation." Tr. at 24. She also believes that the incident has put the individual under a tremendous amount of stress and she believes that the individual may find it to painful to recall the details of the sexual encounter. Tr. at 25.

She testified that the individual has never had any other problems and that he is basically too scared to get into trouble. Tr. at 27. Since the incident, she has noticed that the individual is more passive and he is very worried about what other people think of him. Tr. at 27. Further, she testified that "[The individual] is the type of person that if something happens, or he learns from something, he never repeats it, he never does it again." Tr. at 26. She testified that when she thinks about the incident she is still angry, but she plans to continue as a family. Tr. at 29.

B. The Individual's Brother

The individual's brother testified that he is very close to the individual and he talks with him two or three times per day. Tr. at 145. He testified that the individual told him about the incident, but did not provide him with any specific details. Tr. at 154. He believes the incident was isolated and will not recur. Tr. at 151.

C. Individual's Good Friends and Family

A co-worker of the individual, who later became a lasting friend (hereinafter "good friend"), testified on the individual's behalf. The individual has also become friends with that good friend's mother and his wife. Each of the three family members testified individually.

1. The Good Friend

The good friend testified that he worked with the individual between 2001 and 2004. Tr. at 57-58. Since that time, they have remained very close friends. Tr. at 58 and 66. They often visit each other's homes and participate in social activities on a regular basis. Tr. at 59. He believes the individual is always friendly and that no one ever has anything bad to say about him. Tr. at 59.

He testified that the individual told him about the July 1 incident. "They were having sex, she told him that she - - her husband chokes her while they are having sex, and she asked him to do it, and he had never done that before, but that's what she wanted, so he started doing it." Tr. at 67. He testified that the individual feels terrible about the death of his neighbor. Tr. at 68. The individual told the good friend that the circumstances have led him to conclude that he may have choked the woman. However, the individual's friend believes the individual is still unsure of the exact cause of the neighbor's death. Tr. at 68. He is not certain what will happen to the individual's marriage. Tr. at 64.

He believes the individual's decision to tell him about the July 1 incident indicates that the individual values their friendship. The good friend believes that if the individual did not value their friendship it would have been easy for him to have "roped me off and just decided not to tell me about it at all." Tr. at 69. He summarized by indicating that "I'm shocked that it happened, and I'm disappointed because I know he's a better person than that, but, you know, he's my friend and I stand behind him." Tr. at 61. He testified the individual has always been reliable and exercised good judgment. Tr. at 62.

2. The Good Friend's Mother

The good friend's mother testified that she has known the individual for 3 ½ years. Tr. at 46. The individual rented a condo from her for over a year and she has socialized with him on several occasions. Tr. at 47. She knows the individual to be a good father and loving husband. She believes he has good judgment and the incident was a foolish mistake. Tr. at 49. She testified that the individual told her "he had been drinking, he went back to the house with another woman, and in the course of the incident, the woman eventually had died." Tr. at 51.

3. The Good Friend's Wife

The good friend's wife testified that she has known the individual since 2001. Tr. at 201. Several months after the July 1 incident, the individual told her that he did put pressure on the woman's neck during sexual relations. Tr. at 205. She testified that the individual's belief that he did not choke his neighbor is based on the difference between "choking" and pressure. Tr. at 210. She believes the individual normally exercises good judgment and is reliable and honest. Tr. at 207.

D. The Individual's Mother-in-Law

The individual's mother-in-law testified that she has known the individual for 15 years. Tr. at 73. During that period she has normally seen the individual once every two weeks. However, in the last year she has only seen him every month or two. Tr. at 73. She characterized the individual as a very cautious person. Tr. at 78. He always follows the rules. Tr. at 79. She believes the incident was caused by circumstances beyond his control. Tr. at 80. She believes that in the future the individual will think twice before he makes decisions. She believes the individual will be more reliable in the future. Tr. at 84.

She has talked to the individual's wife (her daughter) in detail about the July 1 incident but only generally to the individual. Tr. at 77. She testified that the individual's wife told her the incident has deeply upset her and that, while she still cares for the individual, she is having a problem forgiving him. Tr. at 82. The individual's wife has told her she doubts the individual's honesty, Tr. at 83, and she believes that there may come a time when the individual's wife will consider a marital separation. Tr. at 82.

D. The Individual's Co-Workers

Five of the individual's co-workers testified. Two of the co-workers have supervised the individual. Each has known the individual since he started working at the site in 2005. All worked closely with the individual after his reassignment to his current position in September 2006. Only the first co-worker has had any contact with the individual away from the work place.

The first co-worker testified that the individual told him his neighbor asked him to choke her and that the individual thought that was the weirdest sexual technique that he had ever heard. Tr. at 98. The individual told the co-worker that the neighbor and her husband often used asphyxiation while having sexual relations. Tr. at 97. "I think he showed some bad judgment, but I also think he's a very reliable person, because of the fact of the history he has at [the DOE facility]." Tr. at 92.

The first co-worker trusts the individual and thinks he is very conscientious. Tr. at 92. As an example of his trust in the individual, he testified that he owns a number of horses that are very important to him. He arranged for the individual to take responsibility for his horses and his home while he was on vacation for two weeks in June 2007. He believes that giving the individual that responsibility is a clear indication of his strong belief that the individual is reliable. Tr. at 92.

The second co-worker testified that he has known the individual for two years. Tr. at 105. He has worked with the individual on a daily basis during the last year. Tr. at 106. He is familiar with the incident. Tr. at 107. He believes the incident indicates bad judgment. Tr. at 112. However, he believes the individual is generally reliable, honest and dependable and the incident was just a tragic accident. Tr. at 108 and 109.

The third co-worker testified that he thinks the individual is honest and reliable. Tr. at 120.

The fourth co-worker stated that the individual has always shown good judgment at work and he believes that he is reliable and honest. Tr. at 131. He testified that the individual told him:

[the neighbor] put his hand on her neck, and he . . . did not know during the sexual intercourse [that he] was he choking her, [or] was she choking herself with his hand, and that's what bothers him . . . and it would help him deal with it a little better if he knew exactly how it happened, but he doesn't know how it happened.

He believes the individual "got caught up in something and made a mistake, and as a result of that mistake, the worse possible outcome happened . . . and [the incident] doesn't really define him as a person." Tr. at 132.

The fifth co-worker testified that the individual told her that he had an extramarital affair and that the woman died. Tr. at 192. She has never seen the individual involved in risky behavior and she believes that the incident was an unfortunate accident. Tr. at 193. She has no reservation about working with the individual and believes he has always been honest with her. Tr. at 194.

G. The Individual

The individual testified that he has been married since 1995, and has worked at the site since 2005. Tr. at 159 and 160. He testified that the July 1 incident was the only time he ever had an extramarital affair. Tr. at 215. He testified that he did not plan to have the affair. Tr. at 217. It was just a normal day until his neighbor asked him out for a drink. At the time of the invitation, he did not understand her motivation. Tr. at 217. He stated that when she told him that she wanted to have sexual relations "I should have said no, but I didn't, and that's what's really irritating to me personally." Tr. at 218.

1. The July 1 Incident

He testified about the July 1 incident. He arrived home at 8:40 P.M. As he was parking his car his neighbor approached him and asked him if he wanted to go to a local bar for a drink with some of her friends. Tr. at 184. He agreed. They drove to the bar in the neighbor's car. The bar's video cameras indicated they arrived at the bar at 9:13 P.M. Tr. at 213. At the bar, they socialized with one of the neighbor's friends. Tr. at 185. The individual and the neighbor left the bar at 11:12 P.M. In the car the neighbor made sexual advances. She then asked if she could park her car in his garage so that her husband would not see the car when he came home from his job. He agreed. She parked her car in the individual's garage and went into his home. Once inside, they agreed to have sexual relations.

During the sexual relations, the neighbor suggested sexual asphyxiation. Tr. at 220. He declined. She then took his hand and placed it upon her neck. Tr. at 164 and 220. "She had her hand on the top of my hand, and she was squeezing my hand to squeeze her neck. . . . the only force was just whatever she could apply to my hand." Tr. at 164. When asked how much pressure he applied to his neighbor's wife's neck, he testified "I would say the same thing I said at the time of the interview, that, no there was not [enough pressure] of her squeezing my hand to cause such an injury." Tr. at 168. He testified that "I can't go a day without thinking where in that process did something go wrong. I still have not figured that out, because from what I felt . . . I just don't see how that could have happened." Tr. at 169.

He testified about whether he thought about the risks associated with sexual asphyxiation. He testified:

I didn't know anything about [sexual asphyxiation]. I didn't know that there was a risk. I've never heard of such a thing, you know.

. . . I didn't think about it, no, because, like I said, she had gestured me I didn't initiate it.

. . . I didn't see how anything could have gone wrong, you know, I didn't – everything just happened so quickly in that situation, . . . that specific gesture [requesting he choke her] didn't even last that long, you know, and I said – and then things moved on to other things.

So you know, given I didn't think – because I was just clueless regarding that whole [sexual technique].

. . . I didn't see any harm in it, because I wasn't aware of what actually was even taking place.

Tr. at 221-222.

After she pressured his hand against her neck they continued with sexual relations. Tr. at 224. After relations ended he talked with her. Tr. at 223. A few minutes later he realized she was gasping for air. Tr. at 225. He initiated CPR and called 911 at 12:20 A.M. Police report at 3.

The individual testified that he is taking responsibility for going to the bar and having an extramarital affair. Since he was present, he recognizes that he was involved in the death. Tr. at 227. However, he

believes “In my heart, I don’t think [I harmed her], but, you know, actions show that it’s possible or that it did happen.” Tr. at 228. He testified that “I don’t understand how I could be talking to someone one minute and the next minute they are gasping for air. That is the part that I don’t understand.” Tr. at 225. “I can’t really say if that little bit of pressure was enough to do it or not. I can’t say that, because I don’t know.” Tr. at 226

2. The Individual’s Statement to the Police

The individual testified about his statement to the police following the incident. He testified that the initial police questioning was aimed at determining if he forced himself on his neighbor. As the questioning started, he provided the background about the evening and tried to explain that the sexual relations were consensual and the asphyxiation was suggested by his neighbor who indicated she used the technique with her husband. Tr. at 172.

The individual believes following his initial questioning, that the police talked to the neighbor’s husband. Tr. at 172. The police then returned to question him for a third time. During that questioning, he demonstrated the amount of pressure that he placed on his neighbor’s wife’s neck. He recalls the police questioner told him that was not very much pressure. After further questioning, the police told him he was not under arrest and he was not a suspect. Tr. at 174. At that point, he perceived that the police thought that the death was accidental. Tr. at 174. He testified, that at that point, I didn’t understand “what happened, you know, and at the same time I couldn’t say that I wasn’t involved . . . I didn’t understand . . . I’m having sex with this person, this choking incident happened, and then there is sex after that, then I’m talking to this person, and then I’m laying down with this person, and then all of a sudden, this person is not breathing.” Tr. at 175.

3. The Individual’s Statement to the DOE

The individual’s PSI occurred seven weeks after the July 1 incident. He testified that during the PSI he provided accurate information to the best of his ability. Tr. at 246. During the PSI, he indicated that the police told him that he participated in his neighbor’s asphyxiation. PSI at 48. However, after a few more questions he stated he did not suffocate or asphyxiate his neighbor. PSI at 48. At that point in the PSI he said:

I don’t, that what I’m saying, I don’t, I don’t, I don’t know. I don’t know, I know that I didn’t do anything to harm anybody. You know, and , and like I said, and how they’ve come up with this, uh, accusation is, is is I’m not understanding. And that’s that’s something that you know, my lawyer is, is trying to work out and determine as well.

Transcript of August 23, 2006 Personnel Security Interview, hereinafter “PSI Tr.” at 49.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing* (Case No. VSO-0002), 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

A. Criterion F Security Concern

1. Police Interrogation

The first aspect of the falsification concern raised in the information statement involves the inconsistent information the individual provided to the police during the several interviews that occurred in the early morning hours of July 1. The police report indicates that the police arrived at the individual's home at 12:27 A.M. They secured the scene. Two police detectives arrived at 1:45 A.M. During their initial interrogation, the individual said he had his hands on the neighbor's neck, but could not remember if he applied pressure to her neck. Police report at 5, line 30. A second interview by the two police detectives took place at 5:15 AM. The police report indicates the individual said that he placed his hands on her throat but it was "fondling, you know just caressing type." Police report at 8, line 20. Later during that interview, the individual stated it is possible at some point that he applied pressure to her neck. Police report at 8, line 41. At the end of that interview, the individual stated "he did feel responsible for [the neighbor's death] because they were engaged in something they should not have been since they were both married. He stated he did not kill [the neighbor] and did not know what caused her death." Police report at 9, line 4.

A third interview by the two police detectives occurred at 7:20 A.M. During that interview, the individual initially denied that he had choked the neighbor. Police report at 9, line 22. However, later he stated that he put his hand on her neck and she put her hand on top of his and squeezed his hand. Police report at 9 line 33. He was then instructed to place his hand on the detective's arm to demonstrate the amount of pressure that applied to his neighbor's neck. He applied light pressure to the detective's arm. Police report at 9 line 34.

These two police detectives were clearly familiar with asphyxiation and knew how to focus the individual's attention in order to help him recall the events of that evening. While there are inconsistencies in the statements he made to the police, I think this is understandable considering the fact that the individual had been up all night and was in a state of agitation and dismay. The police report indicates to me that the individual was attempting to be candid in a difficult situation, and that once well thought out questions were posed the individual's recollection of the details improved. This is clearly why the police technique of going over the same questions a number of times helped the individual provide greater accuracy and detail.

Overall, I believe the transcript of the police report indicates that the individual was confused as to the exact sequence of events in the 15 minutes before the neighbor's death. There are several factors that lead me to conclude that it would be difficult for the individual to recall the details of that night's events. First, the individual had been consuming alcohol prior to the incident. Second, he was not familiar with sexual asphyxiation prior to the incident. Third, he was embarrassed about his decision to have the affair. Finally, the death and the all-night police interrogation created anxiety and stress. Therefore, I believe it does not raise a security concern if the individual was unable to provide fully consistent accurate details of the events taking place during the last 20 minutes of his neighbor's life. It is reasonable to conclude that his ability to fully recall the incident evolved over a period of time and was facilitated by skillful police questioning. Therefore, I believe the individual has mitigated the security concern regarding the information he provided to the police detectives.

2. August 23 PSI

The second part of the falsification concern raised in the information statement has to do with the information the individual provided to the DOE during the PSI that took place on August 23. The security specialist conducting the PSI started the interview by telling the individual that the purpose of the interview was to gather information on the “circumstances surrounding the [July 1 death].” PSI Tr. at 8. The transcript shows the individual immediately revealed that he participated in the neighbor’s death and that he had been arrested two weeks prior to the PSI for “Neglect of Duty.” PSI Tr. at 13.

In order to get a full understanding of the event, the security specialist asked the individual if he had an argument with his neighbor, if there was violence involved in the incident, and if illegal drugs or alcohol were used. Tr. at 22. He then asked how well the individual knew his neighbor. Tr. at 26. He also asked the individual whether he had ever had any other affairs, whether he had told his wife about the incident and if he had planned the sexual encounter. Tr. at 50 and 51. The individual answered all these questions accurately and volunteered that the cause of the neighbor’s death was asphyxiation. Tr. at 48. Clearly, at the end of the PSI, the DOE had identified a Criterion L security concern based on the individual’s decision to be involved in risky sexual activity and on the basis that he was arrested for “neglect of duty.” Tr. at 18.

The information statement finds that during the PSI the individual stated

he had not asphyxiated or suffocated his neighbor prior to her death or during sex and that he had not cut off oxygen to her in any way during sex. He also stated that he had not been involved in anything that could have caused her death and that he did not know what could have caused her death.

Information statement at 1.

The portion of the transcript that the information statement relies on with respect to the falsification concern is as follows:

Question: Okay. Had you at any point, uh, throughout the night, uh, suffocated her, her in any way or asphyxiated her in any way?

Answer: I, I say no, because, you know, I know that, you know, they’re, uh, you know, not not to, uh, you know –

Q. So no, no, you hadn’t?

A. No, I had, you know, that what I don’t understand is because they come up with this and I know that I didn’t do this you know what I’m saying.

Q. Uh-huh

A. It’s just not, its ..., well, that’s where the lawyer and, you know, experts and all that stuff come into play, uh, because it, I would never hurt anybody.

Q. Uh, not at all during sex? Uh, no, no suffocating or asphyxiating or cutting off oxygen in any way?

A. Not, not to my knowledge, no, no.

Tr. at 49.

The information statement is putting too fine a point on the answers here. The individual was having a very difficult time understanding his role in the incident and was in denial about the possibility that the pressure he placed on her neck could have caused her death. The individual's testimony at the end of the PSI indicated that difficulty.

. . . I know the beginning, I don't know how we got to the end . . . one minute I'm sitting here talking to somebody and then the next thing you know they're gasping for air and I, you know, I don't know what happened, I can't explain what happened and, and at that point I did everything I could to help that person.

. . . it was the first time and then, and, uh, and how all of this evolved and got so . . . , I don't, I'm still trying to understand it and then figure it out myself.

Tr. at 51-52.

My impression is that both the security specialist and the individual were unfamiliar with the techniques of sexual asphyxiation. This unfamiliarity combined with reticence to discuss sexual intercourse made it difficult for the security specialist to formulate, and for the individual to answer, questions regarding the details of the sexual asphyxiation. However, the individual fulfilled his responsibility of providing information which permitted the DOE to understand that there was an event which raises a security concern. In addition, the individual authorized the DOE to obtain the police report. *See* attachment to August 23, 2006 PSI. Because the individual provided sufficient information to understand the neighbor's death, I do not believe there was any intentional falsification during the PSI. Therefore, I believe that the individual has mitigated the Criterion F security concern related to his statements during the PSI.

B. Criterion L Security Concern

The security specialist testified that the incident is a security concern because it is such a serious and significant event. Tr. at 277. The individual admits he was involved in his neighbor's death and he exercised bad judgment on July 1. Tr. at 261. However, he argues that this was a freak accident and this one event does not indicate that he will act irresponsibly in the future.

There are several mitigating factors. Initially, I was convinced by the testimony of the co-workers, friends, the individual and his wife that the individual normally follows all rules and social norms. The individual's co-workers also convinced me that the individual is a highly reliable employee. Additionally, the testimony indicates that the individual told his family and friends about the incident and therefore the incident does not make the individual susceptible to blackmail.

The principal mitigating factor presented by the individual is information which indicates that the death was an accident. The police report and the individual's testimony indicate that the sexual relations were

consensual, there was no intent on the part of the individual to kill his neighbor and the death was unforeseen. Those conclusions are supported by the testimony of the individual's friends and family that indicate that prior to the incident the individual had never had extramarital affairs and knew nothing about sexual asphyxiation. The conclusion that the death was an accident is further supported by the fact that, despite his conviction, the individual was not required to serve any jail time. Therefore, I believe the individual has demonstrated that the death was an unforeseen accident.

However, I do not agree with the individual's position that since the death was an isolated incident and was an accident and since the individual has a history of being otherwise reliable he should be granted an access authorization. Tr. at 220. The DOE expects access authorization holders to have a history of demonstrating good judgment. I can not discern exactly why the individual chose to exercise bad judgment in agreeing to have an extra marital affair and by engaging in risky sexual behavior. Furthermore, I cannot determine exactly what transpired in the individual's bedroom on July 1. However, once an individual is involved in inappropriate behavior that leads to such a serious outcome as a death, the DOE must be very cautious in granting that person an access authorization. In this case, it has been only 14 months since the July 1 incident. This is a relatively short period of time from which to rehabilitate from the severity of the circumstances here. *Personnel Security Hearing* (Case No. TSO-0467), 29 DOE ¶ 83,047 (2007) (stating that a one-year period of responsible behavior was insufficient to mitigate a Criterion L concern where the individual provided financial assistance to a foreign national he met on a website). In this regard, I am especially concerned by the fact that the individual was so easily enticed into a compromising situation of having an affair during which he was coaxed into a rash and impulsive act with which he was, by his own account, totally unfamiliar. Section 710.7(a) provides that "any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." Given these circumstances and absent a substantial period of demonstrating good judgment, I believe individual has failed to mitigate the DOE Criterion L security concern related to unreliable behavior.

V. CONCLUSION

I have concluded that the individual has mitigated the DOE security concern under Criterion F but has not mitigated the DOE security concern under Criterion L of 10 C.F.R. §710.8. In view of the record before me, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: September 25, 2007